**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**REGION 2**

**MIRON & SONS, INC.**

**and** **Case No. 2-CA-39597**

**LAUNDRY, DRY-CLEANING & ALLIED WORKERS JOINT BOARD**

# COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS AND BRIEF IN SUPPORT OF EXCEPTIONS

Karen M. Newman
Counsel for the Acting General Counsel
National Labor Relations Board
26 Federal Plaza, Room 3614
New York, New York 10278

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## I. STATEMENT OF THE CASE

The Statement of the procedural history of this case up through the hearing in this matter is fully set forth in the December 17, 2010 Decision issued by the Honorable Steven Davis. (ALJD at 1-2) In his Decision, the ALJ made 18 Conclusions of Law, finding that Respondent violated the Act in numerous instances as alleged in the instant Complaint. (ALJD 31:41 to ALJD 33:10) On February 21, 2011, Respondent filed 71 Exceptions and a Brief in Support of Exceptions to aspects of the ALJ's Decision and Recommended Order and Remedy.

## II. PRELIMINARY STATEMENT

In the 71 Exceptions it filed, Respondent has failed to raise one exception that would necessitate the reversal of any of the ALJ's Conclusions of Law, Recommended Order, or Recommended Remedy. (ALJD 31-36) Except for a completely unsupported diatribe against the Union on page two of its Brief in Support of Exceptions, it appears that the sole basis of Respondent's Exceptions is an attempt to challenge the credibility findings of the ALJ either directly or indirectly.

It is well settled that the Board grants broad deference to and will not overturn an ALJ's credibility findings unless it is convinced by a clear preponderance of all the relevant evidence that those credibility resolutions are incorrect. *Upper Great Lakes Pilots, Inc.*, 311 NLRB 131 (1993); *Storer*

*Communications Inc.*, 297 NLRB 296, fn.2 (1989), citing *Standard Dry Wall Products*, 91 NLRB 544 (1950). Thus, in cases where an ALJ credits the testimony of one witness or witnesses over the others when confronted with conflicting testimony, the Board generally defers to the ALJ's credibility resolutions because credibility is a function not only of what a witness says but also of how a witness says it. See, *Medeco Security Locks*, Inc. 322 NLRB 664 (1996), and cases cited therein.

Instantly, as will be shown specifically below, the ALJ correctly credited the testimony of the former Respondent employees and the union officials who the Acting General Counsel called as witnesses to support its case and discredited the witnesses Respondent called to support Respondent's case.

## III. ARGUMENT: THE ALJ MADE PROPER FINDINGS AND CONCLUSIONS OF LAW

**A. Exceptions 1 and 3** - Contrary to Respondent's Exception 1, the ALJ properly found that the testimony of Miron Markus could not be credited. The ALJ specified in his ALJD the precise reasons why he did not credit Markus' testimony. (ALJD 20: 10- 21:24) The ALJ correctly found that "[t]he most glaring instance of his lack of credibility is his denial . . . that he drafted or distributed the November 23 letter" and his denial that he authorized its preparation or distribution. (ALJD 20:10-12) The ALJ explained that his denial was not supported by the record evidence

because Markus acknowledged in his affidavit that it appeared to be his signature on the document. The ALJ went on to explain that in accordance with the Federal Rules of Evidence, Rule 901(b)(3), he made a signature comparison as the trier of fact and found that the signature was identical to that of Markus on other letters which he admittedly authored and which were received in evidence. (ALJD 20:15-18) The ALJ went on to address Markus' allegation that the document must have been doctored. The ALJ correctly noted that "[t]he Union did not have to manufacture the letter because there were other writings admittedly authored by Markus, such as the November 25 bargaining proposal, which contained similar evidence of unfair labor practices[1]." (ALJD 20:21-23) Further, the ALJ correctly pointed out that the threat of plant closure which was contained in the November 23 letter, was consistent with Markus' pre-trial affidavit in which Markus admitted telling employees he could not afford to pay 16or 17% of gross salary to the Union's benefit fund and if he was forced to pay that amount he would "have no choice but to close the shop in 3 months." (ALJD 20:43-44; GC Exh. 11) The ALJ also correctly acknowledged that the November 23 letter "presents the same view of the Union proposals-that they are extremely unreasonable- as that stated in Markus' November 19

[1] Respondent's November 25, 2009 bargaining proposal, item 15, included threatening that no financial contributions would be made to the union until and unless a new contract was signed between the parties, conditioning bargaining on the Union's agreement to cease engaging in protected activity and threatening the discharge of any employee who goes on strike. (G.C. Exh. 23)(In the record provided by the recording service, the last 3 pages of Exhibit 23 which includes item 15 were mistakenly bound between Exhibits 41 and 42.)

counterproposals –'this company cannot afford the union's proposals.'"(ALJD 20:44-46; GC Exh. 10)

Based on the aforementioned, it is clear that the ALJ properly discredited the testimony of Miron Markus.

**B. Exception 4 -** Contrary to Respondent Exception 4, the ALJ properly found that the November 23 letter was given to employees by a Respondent representative[2]. (ALJD 21:6-7) The ALJ explained specifically that Vaquero's credited detailed testimony regarding separate conversations with three different Respondent representatives supports the finding that Markus knew about the November 23 letter and was responsible for the letter's distribution. (ALJD 21:6-14) Further, Figueroa's testimony confirms that the letter that co-worker Rosario gave him was the same letter that Valderrama attempted to give him on November 24. (Tr. 146-149) Figueroa credibly identified the Nov 23 letter as the letter that was being distributed at the Respondent's facility and that he presented at the hearing. (ALJ Exh. 1) Further, Union Representative Jorge Deschamps corroborated Figueroa's testimony that the letter was distributed at the Respondent's facility. (Tr. 184-185) It is important to point out that Vaquero specified that it was Asst. Supervisor Vasquez who gave him the

[2] With regard to the November 23 letter, Figueroa and Vaquero offered consistent, credible and plausible testimony that they received the letter at the shop. (Tr. 146-149, 364; ALJ Exh. 1) Vaquero offered testimony in detailed form that he was questioned by Markus and Valderrama as to why he wanted copies in English, which serves to undermine Markus' testimony that he was unaware of the letter and did not write it. (Tr.364, 367)

November 23 letter. (Tr. 363-364) Respondent failed to present Vasquez as a witness and the appropriate inferences should be made.

With regard to the November 23 letter, Respondent misleadingly asserts in its Brief in Support of Exceptions that the ALJ "credited the argument that the letter was not written in the manner in which other letters admittedly written by Markus were written". Rather the ALJ was simply responding to an argument set forth in Respondent's brief to the ALJ. (ALJD 20:29-30) In its Brief in Support of Exceptions, Respondent failed to address the ALJ's finding regarding the difference between previous Markus writings and the November 23 letter that was written in Spanish. The ALJ explained that the admitted Markus writings "were written in English and were addressed to the Union. The November 23 letter, in contrast, was directed to the Respondent's Spanish-speaking employees and was in Spanish....Thus, the November 23 letter represents Markus' statements but the precise wording was that of the Spanish translator." (ALJD 20:29-38)

**C. Exceptions 2 and 5 -** Respondent's Exception 2 and 5 are without basis except that Counsel for General Counsel acknowledges that the ALJ incorrectly listed Santos Rosario as a witness. While Rosario was repeatedly referred to by witnesses during hearing, Rosario failed to respond to a GC subpoena and did not testify. In any event, the error is of no moment to the ALJ's overall finding that the employee witnesses

Figueroa, Peguero and Vaquero testified in a straightforward, consistent manner and their testimony concerning statements made to them by Markus was corroborated by other witnesses and by "Markus' admitted writings." (ALJD 21:26-28)

**D. Exception 6 -** With regard to Exception 6, Respondent has the gall to except to the ALJ's determination that Markus testified in an "excited, agitated manner." (ALJD 21:28-30) The record is replete with examples of Miron Markus' inability to behave civilly in the hearing room. Indeed, the ALJ was forced to admonish Markus several times for his outbursts, rants and tirades. Indeed, Counsel for the Acting General Counsel asserts that Markus' outrageous and disrespectful behavior in the courtroom also serves to confirm the many 8(a)(1) statements that were alleged to have been made by him to employees in his facility. (See e.g., ALJD 21:40-51) Reason dictates that if Markus would behave in the manner he did in a courtroom in front of the ALJ, despite being repeatedly admonished for doing so, it is highly likely that he could not and did not control himself and his anger when he spoke to his employees in the friendly confines of Respondent's own facility.

**E. Exception 7 and 31 -** Respondent's Exceptions 7 and 31 are wholly without merit. Contrary to Respondent's baseless assertion, the ALJ's determination that Figueroa was shop steward from about June 2009 is fully supported by the record evidence. Indeed, even Respondent witness

Valderrama confirmed that she knew that Figueroa was shop steward as far back as July 2009. (Tr. 92, 99-100) Further, Respondent witness Jose Ramos testified that he went to Figueroa with his health insurance issue because he understood Figueroa was shop steward. (Tr. 122) Additionally, Figueroa's credited testimony confirms that he had been approached by Jose Lopez, Respondent Manager and Carlos Vasquez, Respondent Supervisor in his capacity as shop steward to discuss disciplinary issues regarding at least one employee[3]. (Tr. 133) The ALJ correctly found that whether or not Respondent was "formally notified by the Union that Figueroa was its steward is beside the point." (ALJD 22:8-9) The ALJ correctly found that his participation in at least one grievance session, his membership in the union's negotiation committee before his discharge, that he relayed information to and from the Union to his co-workers and his insistence when disciplined "that he knew his rights" all served to demonstrate Figueroa's shop steward status. (ALJD 26:15-18)

**F. Exception 8** - With regard to Exception 8, the ALJ correctly determined that Markus' attitude toward Figueroa supports a finding that Markus had knowledge that Figueroa was shop steward.(ALJD 22:5-6) The finding is supported by the timing of the warnings that Figueroa began to receive. Specifically, even loyal Respondent witness Valderrama had to admit that

[3] Carlos Vasquez was identified by Respondent as Supervisor in a document submitted to the Dept. of Labor. (G.C. Exh. 51)

she knew Figueroa was shop steward as far back as July 2009 which is when Figueroa's problems with Respondent began. (Tr. 99-101) Further, Markus' 8(a)(1) statement to Figueroa in or about July 2009, that he should not provide the Union with information supports the ALJ's finding that Markus' attitude towards Figueroa related to his shop steward status and union activities and was more than coincidental. (Tr. 135)

**G. Exception 9** - Contrary to Exception 9, the overwhelming record evidence supports the ALJ's finding that Respondent interfered with the Union representative's right to speak to employees or to report on working conditions to the Union. The ALJ correctly found that Markus' warning to Figueroa discussed *infra*, that he should not give information to the Union violated the Act. *C.P. Associates, Inc.*, 336 NLRB 167, 172(2001); *DaimlerChrysler Corp.*, 331 NLRB 1324(2000).

**H. Exceptions 10 and 11** - Respondent's Exceptions 10 and 11 are also without merit. The ALJ based his determination that the company barred Figueroa from speaking to employees while on break or lunch on Figueroa's credited testimony. (ALJD 22:20-22; Tr. 138) Further, Figueroa's testimony regarding the overly broad no solicitation rule was confirmed by the testimony of Respondent witness Valderrama that "I just tell him that he's not allowed to talk about union when he's at work, or when the other person is at work. (Tr. 386) Clearly, the implications is not to speak about the Union while at Respondent's facility, on break or

otherwise. Moreover, as was demonstrated throughout the hearing and as the ALJ found, Markus had a clear inability to keep his emotions in check during his testimony. It follows that it is highly unlikely that Markus distinguished between work time and break time when he directed Figueroa to cease talking to employees about the Union.

**I. Exceptions 12-14** - Respondent's Exceptions 12 through 14 are also without merit. Indeed, the overwhelming record evidence demonstrates that Markus engaged in an effort to intimidate Figueroa to prevent him from supporting the union. Once again, the ALJ's finding was based upon the ALJ correctly crediting Figueroa's testimony and discrediting Markus' testimony. As the ALJ correctly found, "Figueroa credibly testified that Markus told him on October 18 that he must attend an employee meeting on October 21 at which he would address union matters, and that if Figueroa was 'still continuing the attack against him he was going to fire[Figueroa].'" (ALJD 22:28-30) Additionally, based upon the aforementioned, Counsel for Acting General Counsel submits that Respondent's assertion in its Brief in Support of Exceptions, p.18, that the record revealed no testimony of the aforementioned October 18, 2009, 8(a(1) statement is irresponsible and wholly without merit. Further, the timing of Markus' statement to Figueroa, just 3 days before the meeting with all employees was an attempt to intimidate Figueroa into being silent at the employee meeting. (ALJD 28-35) Additionally, regarding Exception

14, the ALJ's finding was based upon the credited testimony of Figueroa. (ALJD 22:37-39)

**J. Exception 15** - Respondent's Exception 15 is wholly without merit as Respondent presented no objective evidence that Respondent would have to close if it signed a contract under the Union's terms. Other than the discredited testimony of Markus, there was no testimony or documentary evidence supporting such a claim. Indeed, to the contrary, the evidence shows that in December 2009, after the CBA expired, the Respondent unilaterally granted a 30 cent per hour wage increase to the bargaining unit employees while still under the terms of the expired contract.

**K. Exceptions 16-19 -** Respondent's Exceptions 16 -20 are wholly without merit. Figueroa and Peguero both presented properly credited testimony that on or about October 21, 2009, Markus threatened employees that if they went on strike, they would be discharged and not permitted back at the facility.(Tr. 143, 328) Corroborating the former employees' testimony was Respondent's own November 25, 2009 bargaining proposal, paragraph 15, in which Respondent specified that "any employees who are currently employed by the company who chooses to strike against this company will be terminated immediately...." (G.C. Exh. 23, para 15) The ALJ also correctly credited the testimony of Peguero and Vaquero that on or about October 21, 2009, Markus promised employees that they would receive a raise and a better medical plan if they were no longer

represented by the Union. The ALJ found that Markus admitted promising a raise at this meeting and that he gave that raise. The ALJ correctly found that Markus' promises of such benefits violated the Act "particularly where the promises were made in the context of saying that he did not want the Union, and threatened to close if he had to agree to its terms[4]." (ALJD 23: 8-12)

**L. Exceptions 20, 25 and 26 -** Respondent's Exceptions 20, 25 and 26 are wholly without merit. As found by the ALJ, the record evidence demonstrates that commencing on or about November 24, 2009, Respondent, by Valderrama, polled employees about whether they wanted to remain members of the Union. Vaquero and Ramos both testified that the form they were shown by Respondent asked employees to indicate whether they were for the union or for Miron. (ALJD 24:44-50; Tr. 361; G.C. Exh. 17, para 5)[5] Likewise, Peguero credibly testified that while he did not see the form, Valderrama told him that the form was to indicate whether he was on Miron's side or the Union's side. (Tr. 335-336) As found by the ALJ, it is notable that Valderrama admitted that the form produced at hearing was not the original form that she gave to employees as she

[4] It is undisputed that on or about October 21, 2009, Markus threatened employees that he would close the shop if he had to agree to the Union's proposals. (G.C. Exh. 11, para. 4; Tr. 143, 328-329)

[5] As acknowledged by the ALJ in his decision, although Ramos recanted his affidavit testimony during the hearing, it was apparent to the ALJ that Ramos was attempting to help the Employer's case and his testimony is inherently suspect. (ALJD 24:49-50) Ramos' assertion that he more accurately remembered the details of the form at hearing, about one year after seeing the form, as opposed to February 2010, when he gave the affidavit, is ludicrous and cannot be believed. (Tr. 118-121)

claimed to have lost the original. (G.C. Exh. 13; 87-88) While Valderrama claimed that the form was identical to the original, with the same employees having completed the form, as recognized by the ALJ, her testimony was shown to be untruthful because both Ramos and Vaquero testified that they had completed the form, yet the form produced at trial was not completed by Ramos or Vaquero. ( ALJD 24:34-48;Tr. 122-123; 361-362)

**M. Exceptions 21 and 22** - Respondent's Exceptions 21 and 22 are wholly without merit. Respondent attempts to hang its entire argument on the fact that Peguero's timecard does not indicate that he was at work on October 21, 2009. However, Peguero's testimony on direct examination was in response to the question, "Now, directing your attention to on or about October 21, 2009, did you attend a meeting at the Employer's facility" (Tr. 327) Further, Peguero's testimony is corroborated by two other employee witnesses as well as some of Respondent's own documents and Respondent's own witnesses. Further, Respondent's own witness, Ramos testified that Markus conducted several meetings with employees in the fall of 2009 and that Valderrama translated at these meetings. (G.C. Exh. 17, para. 5) Moreover, contrary to Respondent's incorrect assertion set forth in its Brief, Peguero had no ax to grind with Respondent: Peguero left his job with Respondent voluntarily. (Tr. 326) He was not discharged as alleged by Respondent. (Respondent's Brief p. 9) Furthermore, the evidence shows

that Peguero was at work on or about November 23 or November 24, when Markus made a similar promise of benefits that he made on or about October 21, 2009. (Tr. 336; 367)

**N. Exceptions 23 and 24** - Respondent's Exceptions 23 and 24 are without merit. The ALJ specifically credited Vaquero's testimony with regard to the conversation between Vaquero and Markus that took place at about 7:00 am regarding the November 23, 2009 letter. The ALJ acknowledged the "rich detail" of Vaquero's testimony as opposed to the denial by Markus that he had no time to speak to Vaquero at 7:00 am. The ALJ also noted that manager Jose Lopez, who Vaquero testified was present during the conversation was not called to testify by Respondent. (ALJD 24: 5-15) See *Robin Transportation Ltd.*, 310 NLRB 411, 417(1993); and *Redwood Empire*, 296 NLRB 369 (1989). Based upon the aforementioned, the ALJ properly found an unlawful threat of discharge.

**O. Exceptions 27 and 28** - Respondent's Exceptions 27 and 28 are wholly without merit. The ALJ correctly credited Vaquero's uncontroverted testimony that Respondent agent and manager interrogated employees about their support for the Union and that Vaquero told Lopez to leave the employees alone. Respondent made the decision to not call Manager Jose Lopez as a witness and the appropriate inferences must be made. (ALJD25:8-14). See *Robin Transportation Ltd.*, 310 NLRB 411, 417(1993);

and *Redwood Empire*, 296 NLRB 369 (1989). Accordingly, the ALJ's determination is completely supported by the record evidence.

**P. Exceptions 29 and 30 -** Respondent's Exceptions 29 and 30 are wholly without merit. As found by the ALJ:

> it is undisputed that for the period December 2009 through March 2010, the Respondent collected dues from the employees but did not remit those dues to the Union until April 2010. Thereafter, as alleged in the complaint, the Respondent made periodic remission of dues to the Union, and was current in its dues remissions as of the date of the issuance of the complaint." (ALJD 25:18-22)

As there was no evidence presented to the contrary, the ALJ correctly concluded that "respondent violated Section 8(a)(1) of the Act by failing to remit dues it collected to the Union following the expiration of the contract." (ALJD 25:27-29) *Duane Reade, Inc.* 342 NLRB 1016, 1030(2004); *Able Aluminum Co.*, 321 NLRB 1071, 1072(1996). Markus' claim that he kept the money because he did not know where to send the money is ludicrous and of no moment as Respondent failed to remit dues it collected as it had previously done prior to the expiration of the CBA.

**Q. Exceptions 32 and 33 -** Respondent's Exceptions 32 and 33 are wholly without merit. The ALJ correctly found that "Respondent unlawfully told Figueroa not to speak with his fellow employees and warned that he was working for the Respondent and not for the Union." (ALJD 26:20-21) As set forth fully in the discussions related to Exceptions 9-14 which relate to the October 18, 2009 conversation between Figueroa and Markus, the

ALJ based his findings on the credited testimony of Figueroa. The ALJ went on to explain throughout his decision why he did not credit Markus' denials with regard to this conversation as well as other conversations.

**R. Exception 34** - Respondent's Exception 34 is wholly without merit. Figueroa's testimony regarding the conversation he had with Valderrama was properly credited by the ALJ. Moreover, Figueroa's testimony is corroborated by the fact that he was in fact fired shortly after Valderrama advised him that if he continued to speak to his co-workers about the Union he would be fired. (ALJD 26:23-32)

**S. Exception 35** - Respondent's Exception 35 is wholly without merit. As fully set forth in the discussion regarding Exceptions 10 and 11 *infra*, the ALJ correctly found that Markus warned Figueroa that he could not speak to employees at any time.

**T. Exception 36** - Respondent's Exception 36 is wholly without merit. The ALJ specified his precise reasoning in finding that General Counsel met its burden of proving that Union animus was a substantial and motivating factor in the Respondent's warning and subsequent discharge of Figueroa:

> Figueroa's discharge came in the immediate context of the Respondent's unfair labor practices, which I have found, including Markus' unlawful warning that he could not speak to employees at any time and that he worked for the Employer and not the Union, the Respondent's threat to close the shop, interrogations of employees, polling of the workers, promises of better benefits, and illegal conditioning of bargaining. With respect to the September 17 warning and the discharge, as set forth below, he was exercising his

right, under the Act, to speak with his co-workers about their working conditions. (ALJD 26: 34-40)

While Respondent argues that it was Figueroa's lying that led to his discharge, the weakness of this argument is shown by the fact that Respondent continually exaggerated the extent to which Figueroa allegedly passed on incorrect information to co-workers both at hearing and in its Brief in Support of its Exceptions. The fact is that Figueroa had conversations with one employee regarding health insurance issues which the record evidence indicates Figueroa understood as truthful communication and the second incident involved the situation where the Respondent was attempting to poll employees about their support for the Union. There was quite simply no "broadcasting false information to the entire workforce". (Respondent's Brief in Support, p.12) That Respondent Counsel felt the need to mischaracterize the record to such an extent only serves to show the weakness of Respondent's position.

**U. Exceptions 37 and 38 -** Respondent's Exceptions 37and 38 are wholly without merit. There was absolutely no evidence presented that Figueroa knowingly provided incorrect information to co-workers. With regard to Figueroa's conversations with Ramos about health care coverage, the record evidence fully demonstrates that Figueroa initially told Ramos that he did not have the information with him and that he should ask Respondent's secretary. It was only after Ramos approached him

again that Figueroa inquired with the Union on Ramos' behalf. (Tr. 121-122, 138) Secondly, Figueroa's September remark to Ramos about his missing insurance card was merely a restatement of an explanation suggested to him by Union business agent Deschamps. Additionally, the record evidence demonstrates that Figueroa had no reason to doubt that the information he was giving Ramos was true and correct as it was provided to him by his Union business agent. (Tr. 138-140, 182-183) With regard to the information Figueroa provided employees during the Respondent's polling of employees about their support for the Union, the overwhelming record evidence demonstrates that Respondent was engaged in unlawful polling. Further, even if employees were not required to complete the form before receiving their paychecks, it was the understanding of at least some of the employees that they had to complete the form indicating their support for the Union or Respondent prior to receiving their paychecks[6]. Thus, even if Figueroa did inform other employees that Respondent was requiring them to sign a form indicating their position regarding the union, his understanding was consistent with the reports of other employees. Indeed, that co-worker Rosario was the employee who initially informed the other employees that they were being made to sign something regarding their union support has been well

[6] Because employees were accustom to having to complete a form to indicate that they had received their paychecks before they were given their weekly paycheck (Tr. 85), when presented with another form to complete, it was reasonable for the employees to assume that they would not get their paycheck until they completed the form.

corroborated. Figueroa, Peguero, as well as Respondent's witness Valderrama all testified that Rosario gave out the same information that Figueroa gave out yet Rosario was not disciplined in any way. (Tr. 103-105, 150-151, 337-338)

**V. Exception 39** - Respondent's Exception 39 is wholly without merit. Quite simply, the ALJ did not find that "Figueroa did not tell Peguero that Valderrama was requiring a letter to be signed before he would be given his paycheck." Rather, the ALJ found that although Figueroa denied giving the information to Peguero, even if Figueroa "so informed Peguero, he reasonably relied on Rosario's statement to him that he was asked to sign a letter. (ALJD 27:35-38)

**W. Exception 40** - Respondent's Exception 40 is wholly without merit. The ALJ was correct in determining that Figueroa was reasonable to rely on statements made by Rosario. As acknowledged by the ALJ, the evidence supports a finding that the Respondent was engaged in polling of employees. The evidence also shows that employees were used to having to sign a form in order to indicate that they received their paycheck. Thus, it was not unreasonable for employees, including Figueroa to understand that if they were being asked to complete a form just prior to receiving their paycheck, that if they refused to complete the form, they would not get their paycheck. Indeed, both Vaquero and Respondent witness Ramos testified that they completed the form when asked to do so by Valderrama. Only

Pequero said no and when he refused, Valderrama went to Markus for direction. (Tr. 335) Moreover, based on the record as a whole, including Markus' behavior and comments at the facility, and Markus' writings and comments made during the hearing, the ALJ properly found that Figueroa acted reasonably in relying on statements made by Rosario.

**X. Exceptions 41 and 42** - Respondent's Exceptions 41 and 42 do not accurately reflect the determination of the ALJ and are thus wholly without merit. Indeed, the ALJ found just the opposite of what Respondent represents the findings to be in its exceptions. Specifically, in determining that no impasse was reached at bargaining, the ALJ found that "it does not appear that the parties had committed enough time to genuinely explore the issues." (ALJD 28:32-33)(*Emphasis added*) Based upon the reasons set forth in the ALJD, such a finding is fully supported by the record evidence. Likewise, with regard to Exception 42, the ALJ found that "[i]t thus cannot be said that good faith negotiations have exhausted the prospects of reaching an agreement." (ALJD 28:34-35).

Y. **Exceptions 43 and 45** - Respondent's Exceptions 43 and 45 are wholly without merit. Based upon the properly credited evidence before him, in explaining his determination that no impasse had been reached in bargaining, the ALJ simply recounted Respondent's actions between the last bargaining session between the parties and the Respondent's March 2010 letter declaring impasse. (ALJD 28: 38-43; 29:10) The ALJ's

recounting of the events is completely supported by the record evidence and supports the finding that no lawful impasse could have been reached under those conditions. Further, Respondent's claim that the ALJ's determination is contrary to legal authority is baffling and completely unexplained in its brief, thus providing further proof that there can be no rational conclusion that impasse had been reached.

**Z. Exception 44** - Respondent's Exception 44 is wholly without merit. Other than Markus' properly discredited testimony, there was no evidence that the Respondent notified the Union about granting a wage increase in December 2009. Indeed, Respondent counsel does not even make an attempt to address the issue in its brief, or even direct the Board to evidence that could possibly be considered contrary to the ALJ's finding. Accordingly, the ALJ's finding that there is no evidence that Respondent notified the Union about granting a wage increase in December 2009 is fully supported by the record evidence. (ALJD 29:1-4)

**AA. Exceptions 46-49** - Respondent's Exceptions No. 46- 49 are baseless. The ALJ specifically set forth his reasoning that led to his determination that that the Respondent did not give proper notice to the Union and an opportunity to bargain concerning Respondent's cessation of benefit contributions or its intent to pay at a reduced rate. The ALJ went on to find that the Union did not waive its right to bargain about the matter "even assuming that the Union did not send its December 18 letter

rejecting the Respondent's statement that it would not honor its contractual obligations." (ALJD 29:34-36) As evidence to support his finding, the ALJ pointed out that the Union's funds repeatedly notified Respondent that the fund contributions were overdue and demanded payment. (ALJD 29:36-38)

**BB. Exception 50**- Respondent's Exception No. 50 is baseless and mischaracterizes the finding of the ALJ. Specifically, the ALJ did not find that the union had "unfettered access to the production floor". Rather, the ALJ correctly found "the contract provides that the Respondent shall permit the Union's designated representatives to visit the plant at any time during working hours provided that there shall be no interference with production." (ALJD 30:4-6; G.C. Exh. 38, para. 2B)

CC. **Exceptions 51 and 52**- Respondent's Exceptions Nos. 51 and 52 are without merit. Inexplicably and without any case law or other support, Respondent excepted to the ALJ's finding that there was a unilateral change in a past practice that permitted the Union access to the production floor. General Counsel witnesses Wilfredo Larancuent and Jorge Deschamps both presented credited testimony that supported the ALJ's finding that in January 2010, Respondent restricted the Union's agents to visiting with employees in the Respondent's conference room after identifying who they wished to speak with. (ALJD 30: 17-20; Tr. 175, 176-177, 274, 264-266) Further, as properly found by the ALJ, Deschamps went on to present credited testimony that the new procedure caused

employees to be singled out and was a significant change from the prior practice. (ALJD 30:20-23)

**DD. Exception 53-** Respondent's Exception No. 53 is wholly without merit. Inexplicably, Respondent excepted to the ALJ's restatement of the rights protected by Section 7 of the Act and his quoting of Section 13. (ALJD 30:43-44) As Respondent fails to address this issue in its brief, the purpose of the exception is truly baffling.

**EE. Exception 54** - Respondent's Exception No. 54 is wholly without merit. The ALJ correctly pointed out in his decision that the Respondent's letters dated November 25 and December 2 stated that Respondent would not negotiate with the Union while the Union picketed its customers and demanded that the picketing stop immediately. The November 25 letter also stated that Respondent would not bargain as long as the Union conducted a strike against it. (ALJD 30: 38-41) The ALJ correctly found that while it is true that Respondent did not continue to enforce the condition, "the violation is established in the two letters which made bargaining conditional on the Union ceasing its lawful activity. (ALJD 30:48-52) Respondent's defense to unlawfully conditioning bargaining is its ignorance of the law and that Respondent ultimately did return to the bargaining table. Aside from the obvious argument that ignorance is no defense, Respondent fails to mention in its argument that a short time later

it then unlawfully conditioned bargaining on Figueroa's presence at bargaining and then ultimately unlawfully declared impasse.

**FF. Exceptions 55-57** - Respondent's Exceptions No. 55-57 are wholly without basis. The ALJ correctly found that no evidence was presented to support a finding that Figueroa's presence at negotiations would make bargaining impossible or that Figueroa was hostile towards Markus. The ALJ cited case law which finds that a union agent's conduct must be "sufficiently egregious to make bargaining impossible." *Fitzsimmons Mfg. Co.*, 251 NLRB 375, 382(1980); *KDEN Broadcasting Co.*, 225 NLRB 25, 35 (1976). Absolutely no evidence was presented by Respondent which demonstrates that Figueroa's presence would make bargaining impossible. There was no assertion by Respondent that Figueroa was loud, abusive or hostile towards Markus. Indeed, the record evidence shows that it was only Markus who exhibited loud, abusive and hostile behavior not only towards his employees at the facility, but at hearing towards, the ALJ, Union Counsel and General Counsel. Further, Respondent's argument that although Figueroa served as a member of the bargaining committee while employed by Respondent, once he was fired by Respondent, he had no right to be a member of the bargaining committee and thus, Respondent had the right to deny him access to bargaining at the facility is simply not based in Board law. As set forth by the ALJ, "a discharged employee and even a nonemployee may be a member of a union's bargaining committee.

*Vibra-Screw, Inc.*, 301 NLRB 371, 377(1991) It is no wonder that Respondent failed to cite a case in support of its baseless position.

**GG. Exceptions 58-71 -** Respondent's Exceptions 58 -71 are wholly without merit. Respondent has excepted to 14 of the 18 ALJ's conclusions of law. Notably, Respondent has not excepted to the Judge's Conclusion of Law 10 that Respondent violated Section 8(a)(3) of the Act by issuing a written warning to Miguel Figueroa on about September 17, 2009 and by discharging him, nor did Respondent except to the ALJ's Conclusion 15 that Respondent violated Section 8(a)(5) of the Act by ceasing all payments to the Union's Health Fund, Retirement, Education Fund and Legal Assistance Fund, from November 27, 2009 to on or about April 27, 2010, and by failing to make full and complete payments to the funds thereafter without notice to the Union. Accordingly, there are no issues to be decided regarding Conclusions of Law 10 and 15.[7]

Respondent's exceptions to the remaining 14 Conclusions of Law are without merit as the ALJ's Conclusions of Law are based on the correct factual findings the ALJ made throughout his decision. Counsel for the Acting General Counsel directs the Reader of the Record to the responses provided to those underlying exceptions 1 through 57 herein.

[7] The only other two Conclusions of Law Respondent did not challenge are Conclusion 11 which finds the appropriateness of the unit, and Conclusion 12, which relates to the Union's status as the exclusive collective-bargaining representative of the unit.

## CONCLUSION

For all of the foregoing reasons, Respondent's Exceptions to the Findings and Conclusions recommended by the Administrative Law Judge should be rejected in their entirety. The Board should adopt the ALJ's proposed remedy in it entirety, including a cease and desist order, a notice posting or notice mailing if there is no appropriate places to post such a notice, a complete make whole remedy for the Union's benefit Funds, and reimbursement to unit employees for any expenses incurred resulting from Respondent's failure to make such required payment or contributions; a make whole remedy for Miguel Figueroa which should include reinstatement, backpay, and an expungment from its files of any references to the unlawful warning issued to Figueroa and to his discharge; and rescission, upon the Union's request of the unilateral changes made after November 27,2009.

Dated at New York, New York
This 30th Day of March 2011

Respectfully Submitted,

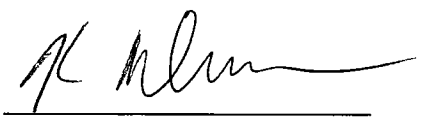
Karen Newman
Counsel for the Acting Counsel
NLRB Region 2
26 Federal Plaza, Rm. 3614
New York, New York 10278

## CERTIFICATION OF SERVICE

Copies of Counsel for the Acting General Counsel's Answering Brief to Respondent's Exceptions and Brief in Support of Exceptions have been sent, by e-mail attachment, this day, March 30, 2011, to:

Regina E. Faul, Esq
Rivkin Radler, LLP
regina.faul@rivkin.com

Megan Chambers
Workers United
Megan.chambers@workers-united.org



Karen Newman
Counsel for the Acting General Counsel
National Labor Relations Board
Region 2
26 Federal Plaza, Rm. 3614
New York, N.Y. 10278